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In The
Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL.

Petitioners,

v.

PATRICIA GARRETT, ET AL.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are law professors with extensive experience in the study of constitutional law, the history of the Fourteenth Amendment and the jurisdiction of the federal courts.[1] Amici have no personal interest in the outcome of this litigation, but are deeply concerned with the development of jurisprudence regarding the respective roles played by the coordinate branches of federal government in protecting the civil rights of the people of the United States. Amici are also concerned as scholars and citizens with the role of the federal government in the correction of State discrimination against certain classes of people. A list of amici is attached to this brief as Appendix I.

SUMMARY OF ARGUMENT

The text and history of the Fourteenth Amendment make clear that its framers intended to vest in Congress the plenary power to remedy all forms of unconstitutional discrimination. The framers designed this authority fully cognizant that it would often be exercised at the expense of "state's rights" or "state sovereignty." History indicates as well that the "equal protection of the laws" manifested both a promise and a command: as a promise, it was to extend to all classes of persons, not merely those that would today be considered "suspect" or "quasi-suspect" classes; as a command, it forbade denials of equal protection, imposing an obligation on the states to

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[1] All parties consent to the filing of this brief. Counsel for neither party authored the brief in whole or in part. No person or entity made a monetary contribution to the brief's preparation or submission.

refrain from invidious discrimination and to ensure that state laws were administered with actual equality, rather than the sham represented by statutes ignored in practice. Finally, history indicates that to secure this promise and to enforce this command, Congress was necessarily vested with the affirmative power to enact comprehensive legislation preventing or remedying state denials of equal protection, including both state discrimination and state failures to protect against discrimination.

The Americans with Disabilities Act represents the culmination of more than twenty years of Congressional efforts to end State discrimination against people with disabilities through a variety of subsidies, restrictions and mandates in discrete areas such as education, transportation, voting, housing and institutional care. In enacting the ADA, Congress was explicit in its findings that these statutes had failed, and that discrimination (including discrimination by the States) was pervasive and nation-wide. Even so, the ADA itself was a product of several years of negotiation and compromise, the very kind of consultation and fact-gathering suggested by this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-43 (1985).

As the Court recognized in *City of Cleburne*, and other cases, discrimination based on disability, although potentially as arbitrary and irrational as other forms of discrimination, requires a different legal approach than other forms of discrimination. Developing the structure for remediation of disability-based discrimination is a particularly inappropriate task for courts (a conclusion reflected in the Court's choice of rational basis level of scrutiny) and

particularly suited to legislative bodies (making deference to Congress in the development of the ADA particularly appropriate). In fact, discrimination against people with disabilities, both pervasive and complex, is a classic example of the sort of "difficult and intractable problem" identified by this Court in *Kimel v. Board of Regents*, 120 S.Ct. 631, 648 (2000) as justifying prophylactic measures aimed at preventing unconstitutional behavior.

Despite this Court's recent references to the deference due to Congress about the need for remedial legislation to protect the rights of citizens under the Fourteenth Amendment, State litigants have interpreted *Kimel* and *City of Boerne v. Flores*, 521 U.S. 507 (1997) as an invitation to dismantle almost fifty years of federal civil rights legislation. States are now questioning their obligation to follow virtually every civil rights enactment that Congress has ever passed, from Title VII to the Voting Rights Act. The Court has now firmly established that Congress may neither reverse Supreme Court interpretations of constitutional rights nor act to abrogate State immunity without a sufficient record of unconstitutional discrimination. In the case of the Americans with Disabilities Act, both requisites have been satisfied, and the Court should uphold Congress' exercise of its Section 5 powers.

I. *The Americans with Disabilities Act is Consistent with the Original and Historical Understanding of the Scope of Congressional Power under Section Five of the Fourteenth Amendment.*

A. *The Framers of the Fourteenth Amendment Intended to Vest Congress*

with Plenary Powers to Remedy State Discrimination.

1. *The History of Section Five.*

On February 26, 1866, Republican Congressman John Bingham of Ohio reported to the House of Representatives a proposed Amendment to the Constitution, drafted by the Joint Committee on Reconstruction, the "Committee of Fifteen." This initial iteration of what would eventually be the Fourteenth Amendment to the Constitution provided as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). After three days of debate, the proposal was tabled until April, Bingham voting with the rest of the Republican majority in favor of the postponement. *Id.* at 1095. It is generally agreed that the decision to table by Bingham and his Republican allies represented something of a strategic retreat; in its initial form, the proposed Amendment had little chance of commanding the necessary two-thirds majority. *See, e.g.,* BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 215 (1914). It is also generally understood that the nominal reason for at least some of the opposition to the proposal was the

fear that it would unduly centralize power. *See, e.g., City of Boerne*, 521 U.S. at 521-25.

The defeat of the original Bingham proposal, however, is not fairly reduced to a simple matter of state versus federal power. Some of the Republicans who voted to table the proposal were, like Bingham, supporters of the measure.[2] Some Republicans who opposed the measure thought that it did not go far enough, *see* Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss). Finally, some Republicans were simply of the view that the Amendment was unnecessary; they were convinced that the Constitution already authorized congressional acts designed to secure equality under law, *see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 253 (1988), a proposition that Bingham--in a distinct minority among Republicans--would not embrace. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 1291 (1866). Democratic opposition to the measure, meanwhile, also transcended the simple opposition of state and federal power[3], and was in any event the identical argument that would be made in opposition

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[2] *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 1054 (1866) (statement of Rep. Higby); *id.* at 1057 (statement of Rep. Kelley); *id.* at 1088 (statement of Rep. Woodbridge); *id.* at 1095 (statement of Rep. Bingham).

[3] The one Democrat to be heard at length on the bill was Congressman Andrew Rogers of New Jersey, a member of the Committee of Fifteen. Rogers did indeed object to the proposal on the grounds that it centralized power. *See* Cong. Globe, 39th Cong., 1st Sess. App. 134 (1866). However, the heart of the matter might have been the litany of social horrors Rogers perceived in the Bingham proposal: "under this amendment a negro might be allowed to marry a white woman . . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school . . ." *Id.* See also id. at 2080-81 (statement of Rep. Nicholson).

to the final iteration of the Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2538 (1866); *id.* at App. 134. *See also id.* at 2080-81.

Interestingly, the opponents and defenders of the initial Bingham proposal found some common ground on this score: it was no valid objection to the amendment to interpose a claim of "state sovereignty." Congressman Woodbridge defended the amendment against the charge that it abridged this elusive "state sovereignty": "It does not destroy the sovereignty of a State, if such a thing exists. It does not even affect its sovereign rights, but merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country." *Id.* at 1088. *See also id.* (statement of Cong. Hale).

The modified proposal that emerged from the Joint Committee in April--the material terms of which were also largely the work of Congressman Bingham--looked very much like the more "radical" proposal suggested by Congressman Hotchkiss, *see id.* at 1095: it secured the substantive rights by constitutional provision and gave to Congress the power to enforce those rights. *Id.* at 2286.

Democratic opposition to the modified amendment remained uniform--no Democrat in either body voted for the measure--and, typically, much of it was expressed in the rhetoric of "state's rights." *See, e.g., id.* at 2530 (statement of Rep. Randall); *id.* at 3147 (statement of Rep. Harding); *id.* at 2940 (statement of Sen. Hendricks); *id.* at App. 240. The opposition to Section Five was hardly surprising. As Bingham would later explain, the grant of power to

Congress envisioned by Section Five matched and exceeded the grant envisioned in his original proposal:

> [Section Five's] grant of power . . . is full and complete. The gentleman [Rep. Farnsworth] says that amendment differs from the amendment reported by me in February; differs from the provision introduced by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition...

Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871). *See also id.* at 84. *Cf.* KENDRICK, JOURNAL OF THE JOINT COMMITTEE at 311 n. 2.

Supporters of the Amendment, meanwhile, were also well aware that the revised Amendment would significantly alter the existing balance of state and federal power, substantially increasing the latter, at times at the expense of the former. Section Five was a vital part of the project, *see, e.g.,* Cong. Globe, 42d Cong., 1st Sess. 257 (1871) (statement of Rep. Baker) ("This section was of course necessary in order to carry the proposed article into practical effect."). As Senator Howard explained to the Senate in his introduction of the measure, Section Five gives Congress "authority to pass laws which are appropriate to the attainment of the great object of the amendment." *Id.* at 2766. Section Five, Howard noted, provided "a direct affirmative delegation of power to Congress to carry out all the principles of all

these guarantees." *Id.* at 2766. *See also United States v. Morrison*, 120 S.Ct. 1740, 1755 (2000)("Section 5 is a 'positive grant of legislative power' that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into "legislative spheres of autonomy previously reserved to the states."'")(citations omitted); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989)(plurality opinion of O'Connor, J.)("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threatens principles of equality and to adopt prophylactic rules to deal with these situations.").

2. *Section Five was Intended to Permit Congress to Act Where States Failed to Protect the Rights of Citizens*

The record before the Thirty-Ninth Congress was replete with instances not merely of official acts of discrimination against the freedmen, but of official failures to prevent or remedy "private" acts of oppression, perpetrated under the watch of indifferent state officials, or with their acquiescence or active support. *See, e.g.*, S. Exec. Doc. No. 39-2 (1866) (Message of the President of the United States Communicating, in Compliance with a Resolution of the Senate of the 12th Instant, Information in Relation to the States of the Union Lately in Rebellion, Accompanied by a Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana; also a Report of Lieutenant General Grant,

on the Same Subject (Report on the Condition of the South)); H.R. Rep. No. 39-30 (1866) (Report of the Joint Committee on Reconstruction) (testimony on oppression and official failures to respond); H.R. Exec. Doc. No. 39-70 (1866).

Section One thus commands that no state shall "deny the equal protection of the law," and "when the equal protection is withheld, when it is not afforded, it is denied." Cong. Globe, 42d Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt). As a necessary consequence, the clause gave rise to an affirmative duty on the part of the states: they are obliged not merely to refrain from unequal treatment, but they are obliged to provide "equal protection." "A state denies equal protection where it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making laws." *Id.* at 501 (statement of Sen. Frelinghuysen). *Accord id.* at App. 182 (statement of Rep. Mercur) (deny means "to refuse, or to persistently neglect or omit to give" equal protection). To deny equal protection meant both the failure to enforce the laws and the failure to ensure that the benefits provided by law were provided equally; *id.* at App. 314 (statement of Rep. Burchard) ("the protection must be extended equally to all citizens. This duty must be performed through the legislative, executive, and judicial departments of its government. If the law-making power neglects to provide the necessary statute, or the judicial authorities wrongfully enforce the law so as to neutralize its beneficial provisions, or the executive allows it to be defied and disregarded, has not the State denied the enjoyment of that right?"); *id.* at 368 (statement of Rep. Sheldon) (clause embraces cases where state "refuses or neglects to

discharge" its duty); *id.* at 459 (statement of Rep. Coburn) ("Affirmative action or legislation is not the only method of a denial of protection by the State").

Thus, when the states regularly fail to protect discrete classes of citizens from acts of oppression or discrimination, they fail to provide the "equal protection of the laws." "If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference, and is a question into which it is not important that Congress should enter." *Id.* at App. 251 (statement of Sen. Morton); *accord id.* at 321 (statement of Rep. Stoughton); *id* at 375 (statement of Rep. Lowe) ("It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?"); Cong. Globe, 43d Cong., 1st Sess. 412 (1871) (statement of Rep. Lawrence) ("If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself").

Congress, as a corollary, was empowered to provide the protection that the states fail to afford. "The State, from lack of power or inclination, practically denied the equal protection of the law . . . And if [Congress] finds that a citizen's constitutional rights are in jeopardy from any cause, that they have been ruthlessly stricken down or wrongfully denied,

and existing laws are inadequate for his relief, it is bound to make such appropriate legislation as shall be sufficient for his protection and redress." Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (statement of Rep. Beatty); *id.* at 71 (statement of Rep. Shellabarger) ("Two things are provided--equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce protection"); *id.* at 370 (statement of Rep. Monroe) ("we shall have no difficulty in finding sufficient grants of power in the Constitution to enable us to protect the lives and property of our fellow citizens when the State governments fail to protect them. We should go to the Constitution expecting to find weapons to defend the weak and the poor, not weapons to strike them down"). And at times, the only sufficient protection--the only "appropriate legislation"--would be in part prophylactic: legislation designed to prevent the abuses permitted or perpetuated by the states. "The true construction of the [equal protection] provision is: `No State shall fail or refuse to provide for the equal protection of the laws.' . . .Is it meant that Congress may enforce a denial? No; it means that Congress may prevent a denial." *Id.* at 482 (statement of Rep. Shellabarger). Only thus could Congress realize the promise of equality envisioned when the Amendment was adopted.

II. *Congress' Power Under Section 5 to Enforce the Fourteenth Amendment is not Limited to Protection of Suspect or Quasi-Suspect Classes*

It is clear from the historical record that Congress intended the guarantees of the Fourteenth Amendment to secure equal rights to all citizens. Although the Court extends particular solicitude to

certain groups of persons by examining legislative classifications relating to them with heightened scrutiny, variations in the level of review are not equivalent to variations in the right at issue. The level of scrutiny afforded by a court neither defines the substance of the right under the Fourteenth Amendment nor diminishes it; "no one has or would argue that the value of liberty varies somehow depending on whether one is alleged to be ill or retarded," *Heller v. Doe,* 509 U.S. 312, 341 (1993)(Souter, J. dissenting).

As recent decisions of the Court reflect, the fact that a legislative classification is subject to rational basis review does not mean that the citizens so classified lose equal protection rights under the Fourteenth Amendment. *City of Cleburne*, 473 U.S. at 432; *Vill. of Willowbrook v. Olech*, 120 S.Ct. 1073, 1074-75 (2000). By its very text, the equal protection clause belongs to all persons.

Rather, if Congress acts to prohibit recognized constitutional violations by the States, or if it acts to prevent those violations through prophylactic legislation and assembles a record of a pattern of violation of constitutional rights to justify such prophylactic action, both historical understanding and the Court's current framework permit Congress to enforce the guarantees of the Fourteenth Amendment, so long as the legislation is congruent and proportional to the identified injuries. Although it has occasionally been suggested that Section 5 power is limited to protected classes, *EEOC v. Wyoming*, 460 U.S. 226, 262 (1983)(Burger, C.J.), the idea that Congress can only legislate under Section 5 to protect certain classes of citizens has never commanded a majority of this

Court or of any Court of Appeals, even those which have held the ADA invalid. *See, e.g., City of Maumelle v. Alsbrook*, 184 F.3d 999, 1008 (8th Cir. 1999)(*en banc*)("We agree that Congressional enforcement of equal protection rights under Section 5 is not limited to suspect classifications"); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 706 (4th Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424) (""It is true, of course, that even rational basis review places limits on the States that Congress may seek to enforce").

III. *The Americans with Disabilities Act is Appropriate Legislation to Enforce Section 1 of the Fourteenth Amendment*

Although Congress' power to legislate under Section 5 is not limited to any particular class or category of persons, it *is* limited to remedying and preventing violations of the Fourteenth Amendment rather than substantive redesign of its meaning. *City of Boerne*, 521 U.S. at 519. The Court's recent decisions in the Eleventh Amendment area, however, have not purported to limit Congress's role in gathering facts and reaching conclusions as to violations of those rights. Moreover, the Court has also reaffirmed its deference to Congressional conclusions that legislation is necessary to remedy or prevent those violations. This Court has in fact gone out of its way to repeatedly underscore that "[i]t is for Congress in the first instance to determine 'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" *Kimel*, 120 S.Ct. at 644 (quoting *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 348 U.S. 641, 651 (1966))).

To be sure, the Court has also insisted that Congress respect the principles of federalism in this process. Thus, even when acting pursuant to Section Five, Congress must clearly state its intent to override the Eleventh Amendment immunity of the states, *Atascadero State Hospital v. Scanlon*, 473 U.S. 274 (1985), and must target State action, *United States v. Morrison*, 120 S.Ct. 1740, 1758 (2000). When Congress enacts legislation to enforce the Fourteenth Amendment, it must be congruent and proportional to the underlying constitutional problem. At the very least, this Court's own cases hold that this burden can be met in two ways, both of which apply in the case of the Americans with Disabilities Act. First, ostensibly neutral rules sometimes disguise discrimination, and Congressional action against those rules may be justified by a showing that the constitutional violation is likely to go undetected without a prophylactic rule, as in the Voting Rights Act. Second, Congress may have "identified . . . [a] pattern of constitutional violations," *Kimel*, 120 S.Ct. at 645, that more targeted legislation has been unable to remedy. Although Congress responded to both of these problems in enacting the ADA, this brief will focus on the second, demonstrating that Congress passed the ADA after decades of more targeted federal legislation failed to remedy State violations of the constitutional rights of people with disabilities.

A. *Congress Passed the ADA After Twenty Years of Targeted, Discrete Legislation Failed to End State Discrimination Against People with Disabilities*

Congress passed more than twenty years of legislation against disability discrimination in a number of discrete areas, including architectural

barriers to government buildings and courthouses, education, transportation, voting, and housing. Beginning in 1968, with the Architectural Barriers Act of 1968, 42 U.S.C. § 4151; the Urban Mass Transportation Act of 1970, 49 U.S.C. § 1612; the Education for Handicapped Children Act, 20 U.S.C. § 1401 (current version titled the Individuals with Disabilities in Education Act); and continuing through statutes such as the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000, the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C.A. § 1973ee-1, and the Fair Housing Amendments Act, 42 U.S.C. § 3602 *et seq*, Congress combined carrots and sticks in a variety of ingenious ways to try to end State discrimination against disabled citizens in specific areas of the law. It offered States federal funds to cease discrimination in education, gave the Department of Justice standing to sue States to prevent discrimination in institutions, mandated that state buildings and transportation systems which received federal funds must be accessible to people with disabilities, and insisted that polling places in federal elections be accessible (thus effectively requiring polling places to be accessible for all elections).

One year after passing Section 504 of the Rehabilitation Act, the first major federal prohibition of discrimination against people with disabilities, Congress amended the act to make the prohibitions stronger, motivated in part by findings of widespread discrimination by the States:

> [i]ndividuals with handicaps are all too often excluded from schools and educational programs, barred from

> employment or are underemployed because of archaic attitudes and laws, denied access to transportation, buildings and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude citizens with handicaps or fail to establish appropriate enforcement mechanisms.

S. Rep. No. 93-1297 (1974), at 28, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400.

The Education for All Handicapped Children Act was passed as a result of the unconstitutional exclusion by States of eight million children from school. *Smith v. Robinson,* 468 U.S. 992, 1009 (1984). The Developmental Disabilities Assistance and Bill of Rights Act contained a bill of rights section for developmentally disabled citizens aimed at the States because "[t]he Committee is well aware that our disabled and handicapped citizens are often unreasonably and unnecessarily deprived of their rights and relegated to second class status." H.R. Rep. No. 94-58, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 919, 925.[4]

In the years prior to the ADA hearings, Congress heard voluminous reports of State violations

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[4] Although this Court held that the Bill of Rights was unenforceable in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981), what matters here is that Congress found out that States unreasonably deprived disabled citizens of their rights and relegated them to second-class status, a factual finding that Congress attempted to remediate through the provisions of the statute, including the Bill of Rights.

of the constitutional rights of their institutionalized citizens. For example, the House Conference Report on the Civil Rights of Institutionalized Persons Act noted:

> Since 1971, the Attorney General has participated in a series of civil actions seeking to redress widespread violations of constitutional and federal statutory rights of persons residing in state institutions. [Because two federal courts had held that the Attorney General did not have standing to participate in such litigation, Congress enacted this legislation to explicitly confer such standing]... H.R. 10 ensures that institutionalized people will be afforded the full measure of protections guaranteed to them by the Constitution of the United States.

H.R. Conf. Rep. No. 96-897 (1980), *reprinted in* 1980 U.S.C.C.A.N. 832. Congress passed the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997, specifically to permit the Attorney General to sue States for violating the constitutional and federal rights of persons in institutions, many of whom were severely disabled.

Despite the hopes expressed in the House Report, violations of the constitutional rights of institutionalized citizens continued unabated on a national scale. In April 1985, Senate staff presented a report to the Senate Committee on Labor and Human Resources summarizing the results of their visits to thirty-one state institutions in twelve states. After

conducting approximately 600 interviews, the Report documented deaths and beatings, sometimes of patients in seclusion or restraints, across the nation from South Carolina to California. The Report summarized that "residents are vulnerable to abuse and serious physical injury...sexual advances and rape," and concluded that neither the States nor the Federal government were successful in controlling these conditions. S. Rep. No. 99-50, pt. 2, App. at 2, 20-25, 76-82 (1985) (Staff Report on the Institutionalized Mentally Disabled). Many of the conditions reported to Congress clearly implicated the constitutional right to safety and freedom from harm in institutional settings. *Youngberg v. Romeo*, 457 U.S. 307 (1982). After extensive hearings and receiving this report, Congress passed the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801, yet another Congressional response to State violations of the constitutional rights of persons with disabilities. While the Civil Rights of Institutionalized Persons Act gave the Justice Department standing to sue to protect institutionalized persons' rights, the Protection and Advocacy for Mentally Ill Individuals Act gave the States money to create programs to prevent and remedy the violations of institutionalized disabled persons' rights—but only while they were in the institutions and for ninety days following discharge, 42 U.S.C. §§ 10805(a)(1)(B) & (C).

Despite the passage of these more narrow statutes, testimony before Congress in support of the ADA revealed that little had changed. The prior laws had not resolved the unconstitutional injuries. This truth was reflected in the national reports before Congress and in the testimony of both disabled

witnesses and federal and state officials. Then-Attorney General Thornburgh noted that:

> [o]ver the last twenty years, civil rights laws protecting disabled persons have been enacted in a piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

H.R. Rep. No. 101-485, pt. II, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 330.

The Attorney General of Illinois, Neil Hartigan, Dr. Mary Lynn Fletcher, and numerous other witnesses confirmed that neither federal legislation nor state legislation aimed at protecting people with disabilities was accomplishing that goal. Mr. Hartigan testified that imposing a non-discrimination mandate only upon recipients of federal funds under the Rehabilitation Act resulted in "total confusion" and "inability to expect consistent treatment." *See* S. Rep. No. 101-116, at 12 (1989). Fletcher testified that because Federal assistance often didn't reach rural areas, there was no protection from discrimination for people with disabilities who lived there. *Id.* at 12-13. Harold Russell, Chairman of the President's Committee on Employment of People with Disabilities, reported that "the fifty State Governors' Committees, with whom the President's Committee works, report that existing State laws do not adequately counter such acts of discrimination." *Id.* at 18.

After hearing this testimony, Congress explicitly concluded in the language of the ADA itself: "current federal and state laws are inadequate to address the discrimination faced by people with disabilities . . . " 42 U.S.C. § 12101(a)(3). When "previous legislation has proved ineffective," broader prophylactic legislation is justified, *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). In assessing the congruence and proportionality of the ADA, it is appropriate for this Court to consider the years of evidence of State discrimination before Congress as it enacted discrete statute after discrete statute, which federal, state and individual witnesses testified had failed to end discrimination against people with disabilities. In this context, "[w]hen Congress enacts appropriate legislation to enforce [the Fourteenth Amendment], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution." *Alden v. Maine*, 527 U.S. 706, 756 (1999)(citations omitted).

In passing the Americans with Disabilities Act, Congress was not acting on a blank legislative slate, nor did it seek to overturn existing Equal Protection jurisprudence, as in *City of Boerne*; it met its responsibility to present a fully developed evidentiary record of discrimination, unlike *Kimel*, and clearly targeted State actors, unlike *Morrison*.

It would not, of course, be constitutionally sufficient had Congress acted to protect people with disabilities from adverse State action that was rationally related to legitimate state objectives. State deprivations of the rights of disabled people must rise to the level of constitutional violations to support

corrective action such as Title II of the ADA. Amici contend that even under rational basis review, the earlier statutes and then the ADA targeted widespread State violations of fundamental rights such as the right to vote and the right to safety in institutional settings, as well as arbitrary and irrational exclusion from school, employment and transportation. These continuing actions and policies by the States constituted violations of disabled people's right to equal protection of the laws. The result in *City of Cleburne* itself demonstrates that government entities do violate the constitutional rights of disabled individuals under the rational basis standard.

B. *Rational Basis Review is Not a Reflection of the Severity or Pervasiveness of Constitutional Injuries, but Rather of the Appropriate Branch of Government to Redress Such Injuries*

The Court's holding in *City of Cleburne* establishes rational basis review as the standard for determining whether States have violated the constitutional rights of their disabled citizens, although the Court also explicitly stated that it was making the rational basis finding "absent controlling Congressional direction." 473 U.S. at 440. The reasons cited by the Court for selecting rational basis review in *City of Cleburne* argue strongly for upholding Congressional action in passing the ADA, a law which concededly prohibits some behavior that the Constitution alone would not condemn. The Court cited two reasons for choosing rational basis review. First, because disability is not simply a matter of physical or mental impairment but of the degree to which that impairment interferes with, or is regarded as interfering with, one's functional abilities, it raises

complex questions of definition. *See, e.g. Albertson's v. Kirkingburg*, 527 U.S. 555, n. 12 (1999)(some people with monocular vision are disabled and others are not). The Court's observation in *City of Cleburne* with regard to mentally retarded people is even more true of people with disabilities in general: they are "a large and diversified group" more difficult to define than categories such as alienage and illegitimacy. 473 U.S. at 442. Second, unlike race or gender, which were recognized as rarely presenting relevant considerations in any principled decision making, disability is sometimes relevant to decisionmaking. Disability has significant consequences in the world that a rational legislature can take into account. Notably, disability has been the basis on which legislatures have passed beneficial legislation. The rational basis standard of review gives both States and the federal government the flexibility to take the complex nature of disabilities into account where they are relevant, and to act to benefit groups of people with disabilities. If this Court had chosen a higher level of scrutiny against which to evaluate differential treatment of people with disabilities, programs such as disability benefits for severely disabled people might have fallen under challenge by non-disabled people. *See Adarand v. Pena*, 515 U.S. 200 (1995)(subjecting affirmative action programs to strict scrutiny review).

However, as the Court's decision in *City of Cleburne* shows, the rational basis standard of review does not give States a free pass to engage in widespread invidious and arbitrary discrimination. The fact that some classifications based on disability are rational does not mean that people with disabilities are not also subject to irrational, widespread and persistent discrimination in violation

of the Fourteenth Amendment. The Court's selection of rational basis review in *City of Cleburne* could not be (and did not purport to be) a factual finding about the pervasiveness and persistence of unconstitutional discrimination by the States in general against people with mental retardation, much less people with disabilities. After hearing written and oral testimony from hundreds of witnesses, and studying hundreds of pages of research and reports submitted to it, Congress did make such findings. It found that much state legislation, policy and practices toward people with disabilities was neither remedial nor even rational, but exclusionary, arbitrary, segregationist, irrational, based on myths and stereotypes, and springing from ignorance and even hostility. Unlike the record before Congress in *Kimel*, the massive record compiled by Congress in passing the ADA implicated a broad range of State statutes, policies, and customs that violated even the rational basis standard of review.

When Congress passed the ADA, it was aware that State statutes providing protection to people with disabilities existed on paper but were not meaningfully enforced. Even in *City of Cleburne*, the Court's reference to a Texas statute giving Texas citizens the right to live in group homes as protective was undermined by the recognition that plaintiffs in *City of Cleburne* dropped their claim under that statute--which had been in force for almost ten years at the time of the litigation--because "[t]he Act had never been construed by the Texas courts," *City of Cleburne* at 444 n.11.

In fact, what Congress learned in the ADA hearings was that the very presence of these well-

intentioned but unenforced statutes served to shield the State's more invidious actions:

> The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of 'good intentions.' ...The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk-it has meant being excluded from public schools, being denied employment opportunities, and being deemed an 'unfit parent.' These injustices coexist with an atmosphere of charity and concern for disabled people.

H.R. Rep. 101-485, pt. II, at 41 (1990) (testimony of Arlene Mayerson).

At the time Congress was considering the ADA, the record of states towards people with disabilities bristled with contradictions - pity and antipathy, overprotection and outright brutality - resulting in a complicated mixture of legislation, policy and practice that occasionally protected the disabled, sometimes used protection as an excuse for invidious discrimination (as in *City of Cleburne*), and sometimes simply discriminated in a harsh and unambiguous manner. What Ms. Mayerson's testimony underscores--and what supports both rational basis review by the courts *and* deference to congressional judgment in crafting the Americans with Disabilities Act--is that

while there is a record of a core of hostility, irrationality, and failure to protect people with disabilities by the States, much of the discrimination is more subtle but just as damaging, and intentional discrimination is more difficult to see in the individual case than in the composite portrait presented by the voluminous testimony heard by Congress when it considered the ADA.

The meaning of discrimination itself as a legal concept is more difficult in the case of people with disabilities. Although Congress recognized that certain patterns of discrimination against people with disabilities strongly resembled patterns of discrimination on the basis of race, including the emphasis on state-imposed segregation, widespread exclusion from the public school system and from voting, it was equally clear that traditional concepts of discrimination developed in the context of race discrimination were not completely suited as a mode of analysis for people with disabilities.

For example, it is crucial to understand that applying traditional concepts of equal protection to people with disabilities would simply maintain a discriminatory status quo. Society can rationally aspire to be "color-blind" in a way that it cannot and should not wish to be "disability-blind." Giving a person who is mobility-impaired an equal right to vote or be a juror, without concomitant changes in polling places or courtrooms, may accomplish nothing practical, and the framers of the Fourteenth Amendment wanted nothing if not to make equal protection real. They were not content with the equality on paper that existed in some states, when contrasted with the actual conditions reported by

General Schurz and the Committee of Fifteen. Neither equality nor intentional discrimination mean the same thing in the context of disability discrimination. If police put a paraplegic arrestee in a paddy wagon in exactly the same way as they would put an able-bodied arrestee into the wagon, they are not providing equal protection, *see Gorman v. Bartch,* 152 F.3d 907 (8th Cir. 1998). If a ramp into a courthouse or an interpreter at a town meeting is considered "something extra," beyond the bounds of equal protection, then equal protection will be meaningless for people who cannot climb the steps or hear the speakers. "Reasonable accommodation" that requires a ramp to the polling booth or an elevator to the courtroom is not something "extra"--it is the only way to ensure equal protection of the laws for people with mobility impairments. If state-operated transportation systems are not equipped with lifts, they are more segregated on the basis of disability than the buses of Montgomery were on the basis of race.

Thus, both the nature of disability and the nature of discrimination based on disability is complex, and it is in these circumstances that the legislative process is particularly well suited to remediation. The Court's rationale for its decision in *City of Cleburne* applies equally well to upholding the Americans with Disabilities Act:

> [h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative

> decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

473 U.S. at 442-43.

Just as the complexity of disability and of the ways that discrimination on the basis of disability manifests itself were reasons for the Court not to step out in front of the legislative process in *City of Cleburne*, they are reasons for the Court not to overturn the laborious fact-gathering, negotiations and compromises Congress went through in passing the ADA. They also serve as reasons for this Court to defer to Congress's conclusion that prohibition of a concededly broader swath of constitutional behavior was required to guarantee equal protection of the laws for persons with disabilities. In the case of people with disabilities, if legislation "merely parrots the precise wording of the Fourteenth Amendment," *Kimel*, 120 S.Ct. at 644, it would be virtually useless to enforce equal protection. The ADA itself concededly prohibits States from engaging in constitutional behavior as a means of deterring unconstitutional behavior. However, as the Court recently reaffirmed in *Kimel*, "that [a statute] prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Id.* at 648.

Disability discrimination is the classic example of an extremely difficult and intractable problem. The ADA represents an example of what Congress is best

suited to do in dealing with such problems, and is the product of negotiations, amendments, line-drawing, and compromise before passage by Congress. Its numerous provisions, including safe harbor exclusions for insurance companies, elimination of damage actions under Title III, and a number of qualifications and defenses, reflect a struggle by hundreds of legislators to reconcile the twin realities of discrimination and difference. That struggle, which took several years and was the culmination of twenty years of more limited federal efforts to entice, exhort and coerce the States to cease discriminating against their disabled citizens, is entitled to respect by this Court.

IV. *Lower Courts are Increasingly Confused and in Conflict as to the Scope of Congressional Power to Protect the Civil Rights of Individuals Against Violations by the States*

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992). The federal statutory framework protecting the civil rights of people in this country against violations by the States is undermined by doubt and uncertainty. Despite this Court's repeated recognition of Congress' power to enforce Section 5 of the Fourteenth Amendment, its recent cases have created substantial uncertainty in the lower courts and among litigants as to the scope of Congressional power to protect the civil rights of citizens against encroachments by the States. The decision in *City of Boerne* has led States to challenge their obligations under virtually the entire structure of federal civil rights protection. *In re Employment Discrimination Litigation*, 198 F.3d 1305 (11th Cir. 1999)(challenging

Title VII); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 1999)(challenging Title VII); *Fitzwater v. First Judicial District of Pennsylvania*, No. Civ.A. 99-3274, 2000 U.S. Dist.LEXIS 4931 (E.D. Pa. April 11, 2000)(challenging Title VII); *Sandoval v. Hogan*, 197 F.3d 484 (11th Cir. 1999)(challenging Title VI); *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998)(challenging Title VI); *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999)(challenging Title IX), *cert. denied* 120 S.Ct. 1220 (2000). One court even reassessed whether the Voting Rights Act was a constitutional abrogation, *Mixon v. Ohio and Michael White*, 193 F.3d 389, 398-99 (6th Cir. 1999). A significant array of other federal statutes have also been challenged as violative of States' Eleventh Amendment rights. *Union Pacific v. State of Utah*, 198 F.3d 1201 (1999)(challenging Railroad Revitalization and Regulatory Reform Act); *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999)(challenging CERCLA); *Bell South Telcoms v. MCIMetro Access Transmission Services*, 97 F.Supp.2d 1363 (N.D. Ga. 2000)(challenging Telecommunications Act of 1996). The circuit courts are in disarray and conflict about the constitutionality of most federal antidiscrimination statutes.

This case, markedly different from the cases in which the Court has invalidated Congressional legislation to date, is an opportunity to reaffirm that this Court is not intent on radically rearranging the separation of powers or undermining the federal government's power to protect against State violations of civil rights. Unlike *City of Boerne* and *Kimel*, Congress assembled a voluminous record of hundreds of individual testimonies, as well as reports and statistics based on national studies. It acted after two decades of more narrowly tailored legislation failed to

end discrimination against people with disabilities. Congress took its role seriously in enacting the ADA. The Court can use this opportunity to reaffirm its own expressed commitment that when Congress responsibly carries out the mandate of Section 5 to correct identified State violations of constitutional rights, the Court will give Congress "wide latitude in determining where [the line between appropriate remedial legislation and redefinition of constitutional rights] lies." *City of Boerne,* 521 U.S. at 520. In the process, the Court can give direction and clarity to lower courts and litigants.

V. *Conclusion*

Where Congress carefully assembles a record replete with factual support for its conclusion that people with disabilities are being subjected to unconstitutional discrimination by the States, and engages in over two years of negotiations, amendments, and redrafting to accommodate the parties' differing interests, it has acted precisely as a legislature in a democratic nation should act in addressing a difficult and complex social problem. "Our national experience teaches us that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne*, 521 U.S. at 535-36. In this case Congress has acted within its proper role in abrogating the States' Eleventh Amendment rights. This Court should defer to its well-documented findings as to the extent and urgency of discrimination against people with disabilities, and the need for sweeping remedial legislation to correct it. *Amici* urge the Court to affirm the Court of Appeals' decision.

Respectfully Submitted,

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APPENDIX I

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